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No. 93-1630

In the Supreme Court of the United States

OCTOBER TERM, 1993

ANDREW V. RESTIVO, II, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the limitations placed on petitioner's cross-examination of a government witness violated the Confrontation Clause.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 8 F.3d 274.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 1993. A petition for rehearing was denied on December 27, 1993. Pet. App. 23-24. The petition for a writ of certiorari was filed on March 28, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of conspiracy to misapply bank funds and to make false entries in bank documents, in violation of 18 U.S.C. 371; bank fraud, in violation of 18 U.S.C. 1344; misapplication of bank funds, in violation of 18 U.S.C. 656; money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i); making false entries in bank documents, in violation of 18 U.S.C. 1005; and making false statements before a grand jury, in violation of 18 U.S.C. 1623(a). He was sentenced to 100 months' imprisonment, to be followed by a three-year term of supervised release. The court of appeals affirmed. Pet. App. 1-22.

1. Petitioner was the president of Schwegmann Bank. One of the bank's customers was Jerry Delchamps, the president of Dixie Lloyds Insurance Company. In February 1990, Delchamps' accounts with the bank were overdrawn by $345,000. With petitioner's knowledge, but without the knowledge or approval of the bank's board of directors (the board),[1] Delchamps obtained a $500,000 loan by executing a promissory note in that amount to the bank. Pet. App. 2-3; Gov't C.A. Br. 4-10.

By April 1990, Delchamps' accounts with Schwegmann Bank were again overdrawn. On April 11, Delchamps executed another $500,000 promissory note to the bank, again without the knowledge of the board. Petitioner initialed the note so that the

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[1] Any loan over $250,000 required the board's approval. Gov't C.A. Br. 8 n.2.

proceeds could be disbursed, and he used a portion of the proceeds to pay off the outstanding balance on the February loan to Delchamps. Two days later, Delchamps executed another promissory note to the bank in the amount of $485,328.96, which petitioner also initialed. Again, the board had no knowledge of the unauthorized loan. Pet. App. 4, 22; Gov't C.A. Br. 10-12, 49.

In 1990, Delchamps engaged in a check-kiting scheme involving Schwegmann Bank and the Bank of Louisiana, where he also maintained checking accounts. Delchamps deposited checks drawn on each bank in the other bank to make it appear that there were substantial deposits in his accounts at both banks. Although petitioner knew that Delchamps was writing checks for more than $50,000 drawn on Schwegmann Bank and that Delchamps' accounts at the bank were constantly overdrawn, petitioner often authorized payment of Delchamps' non-sufficient funds checks. When a bank officer told petitioner that he suspected that Delchamps was involved in a check-kiting scheme between Schwegmann Bank and the Bank of Louisiana, petitioner directed the officer to continue accepting checks drawn on the Bank of Louisiana from Delchamps. Pet. App. 5 n.5, 20; Gov't C.A. Br. 12-13, 41-46.

2. Before trial, Delchamps entered into a plea agreement with the United States, under which he agreed to cooperate with the government and to plead guilty to mail fraud and conspiracy to commit bank fraud. Pet. App. 43, 46-47. The agreement stated that Delchamps understood that the "maximum possible penalty" for each of those offenses was five years' imprisonment, and that the sentencing court could

impose the maximum penalty. *Id.* at 43-46. The agreement also stated that "[t]he United States may, but shall not be required to" file a motion requesting the sentencing court to depart downward from the Sentencing Guidelines "in the event the defendant provides 'substantial assistance,'" but that "[i]t shall be the sole discretion of the United States Attorney as to whether a motion requesting departure * * * should be filed."[2] *Id.* at 47-48. Finally, the agreement stated that it was Delchamps' "entire agreement" with the government and that "there are not any other agreements, letters or notations that will affect this agreement." *Id.* at 49.

At petitioner's trial, Delchamps testified on direct examination that he had pleaded guilty to mail fraud and conspiracy to commit bank fraud pursuant to an agreement with the government and that he was awaiting sentencing. Pet. App. 25-27. The prosecutor introduced Delchamps' plea agreement into evidence, and Delchamps testified that his understanding of the agreement was that if he testified truthfully, the government would request that the sentencing court impose a "lighter sentence." *Id.* 27-28. Delchamps testified, however, that the government had not promised him anything, and that he had no other agreements with the government. *Id.* at 29.

On cross-examination, Delchamps acknowledged that he could have been, but was not, charged with

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[2] Sentencing Guidelines § 5K1.1 authorizes a court to impose a sentence below the Guidelines sentencing range "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense."

money laundering. Pet. App. 30-31. Petitioner's counsel then asked Delchamps:

> So as far as your plea agreement, you got a cap on the maximum amount of sentence that you could possibly receive in any set of circumstances?

Id. at 31. The prosecutor objected to "any testimony relative to sentence." *Ibid.* Petitioner's counsel explained, "Your Honor, I was simply establishing a cap, not anything that could be discretionary." *Ibid.* The district court sustained the objection, stating that "[t]here is no cap." *Ibid.*

Petitioner's counsel then turned to the subject of the potential government motion under Guidelines § 5K1.1 requesting that the court impose a lower sentence based on Delchamps' cooperation. After establishing that Delchamps understood that "an important part of the determination" of his sentence would depend on whether the government filed a motion "setting forth the amount of your cooperation as perceived by the United [S]tates Attorney's Office," and that this was a "very important factor" to Delchamps, petitioner's counsel asked:

> And the only way you can get that 5K letter is if [the prosecutor] and the office of the United States Attorney think you've earned it?

Pet. App. 31-32. Delchamps responded, "Or if I tell the truth, which I'm doing." *Id.* at 32. Petitioner's counsel then asked:

> But they have to agree that what you say is the truth in order for them to write that letter. They're not obligated to give you that letter?

Ibid. The prosecutor objected on the ground that petitioner's counsel was "misstating" the plea agreement. *Id.* at 32-33. Petitioner's counsel explained that Delchamps "might have an understanding aside from * * * the plea agreement." *Id.* at 33. The court asked Delchamps whether his understanding of the plea agreement was "what was represented by the document that you signed," and Delchamps responded affirmatively. *Id.* at 34. The court then stated, "And that document is in evidence. The jury can review it." *Ibid.*

Finally, petitioner's counsel asked Delchamps a series of questions about the involvement of his daughter and son-in-law in Delchamps' insurance company. After eliciting that Delchamps' daughter was an owner of the insurance company, that she and her husband worked for the company, and that she had signed many of the checks that were introduced into evidence at petitioner's trial, petitioner's counsel asked:

> And it was not part of the deal that you described or is it in your plea agreement, but—

Pet. App. 34-36. The prosecutor objected, and petitioner's counsel explained that he was "just exploring what the facts are, Your Honor, that none of these other people have been charged." *Id.* at 36. Petitioner's counsel then asked whether Delchamps had purchased a house for his daughter and son-in-law "out of one of the accounts, their monthly notes." *Id.* at 37. The prosecutor objected on grounds of relevance. *Ibid.* At a bench conference, petitioner's counsel stated that Delchamps' daughter and son-in-law "did as much as anybody did" in connection with

Delchamps' company, but were "not charged" and "not named as targets or subjects." *Id.* at 38. The defense attorney explained that he was attempting to show that Delchamps had an incentive to testify favorably for the government "because it will benefit him and those near him." *Id.* at 39. The prosecutor responded that "[t]hat's not in the agreement, Your Honor." *Ibid.* The court concluded that petitioner's counsel had not "proven bias," and directed the attorney to "[s]tay off" that line of questioning. *Id.* at 39-41.

3. The court of appeals rejected petitioner's contention that the curtailment of his cross-examination of Delchamps violated the Confrontation Clause. The court explained that "[t]he Confrontation Clause of the Sixth Amendment is satisfied where defense counsel has been 'permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.' " Pet. App. 7-8 (quoting *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974)). In this case, the court noted, petitioner's counsel "was permitted to expose to the jury the following: that Delchamps entered into a plea agreement with the government; that Delchamps could have been charged with the more serious offense of money laundering if not for his plea agreement; and that the issuance of the § 5K1.1 letter for sentencing purposes was within the discretion of the government." Pet. App. 8. The court concluded that "[b]ased upon these facts, the jury could have inferred that Delchamps was a biased witness." *Id.* at 8-9. Accordingly, the court held that the district court's restrictions on

petitioner's cross-examination of Delchamps did not violate the Sixth Amendment. *Id.* at 9.

ARGUMENT

Petitioner renews his contention (Pet. 17-52) that the district court violated the Confrontation Clause by restricting his cross-examination of Delchamps. The court of appeals properly rejected that claim, and its fact-bound holding does not merit this Court's review.

In *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986), the Court held that a defendant's confrontation rights are violated when he is denied all cross-examination regarding a subject that "a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony." *Id.* at 679. The Court made clear, however, that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concern about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Ibid.* See also *Michigan* v. *Lucas*, 500 U.S. 145, 149 (1991); *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974).

In this case, the district court was well within its discretion in limiting cross-examination that might have misled or confused the jurors. Petitioner's attorney asked whether Delchamps "got a cap on the maximum amount of sentence that you could possibly receive in any set of circumstances" (Pet. App. 31), but that question misleadingly implied that the government and Delchamps had agreed to an upper limit on Delchamps' sentence other than the five-year

statutory maximum term for each offense that was set forth in the plea agreement. Similarly, while the attorney suggested to Delchamps that "[the government has] to agree that what you say is the truth" (*id.* at 32) to file a motion requesting a downward departure from the Guidelines, the plea agreement actually provided only that the government had "sole discretion" (*id.* at 47) in determining whether to move for a downward departure. Finally, the defense counsel's suggestion that Delchamps and the government had reached an unwritten agreement that the government would refrain from charging Delchamps' daughter and son-in-law for their involvement with Delchamps' insurance company was directly contradicted by the plea agreement, which specifies that it is "the defendant's entire agreement with the Government; there are not any other agreements, letters or notations that will affect this agreement." Pet. App. 49. Defense counsel offered no foundation for his contrary speculation.

As the court of appeals recognized, Pet. App. 7-8, the Confrontation Clause is not violated by the curtailment of cross-examination when the jury receives sufficient information to make a discriminating appraisal of the witness's motives for testifying for the government.[3] In this case, the prosecutor elicited

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[3] See *United States* v. *Taylor*, 17 F.3d 333, 340-341 (11th Cir. 1994) (finding no confrontation violation in denial of a line of cross-examination when "the jury possessed extensive information from which to gauge [the witness's] credibility"); *United States* v. *Caming*, 968 F.2d 232, 237 (2d Cir.) (despite denial of cross-examination on two points, district court did not improperly curtail cross-examination where "the jury still was in possession of facts sufficient to make a discriminating

from Delchamps that he had pleaded guilty to fraud charges pursuant to an agreement with the government and that he had not yet been sentenced. The prosecutor also introduced into evidence Delchamps' plea agreement, which stated that the government had discretion to file a motion requesting that Delchamps receive a lower sentence based on his cooperation. On cross-examination, Delchamps testified that he could have been, but was not, charged with money laundering,[4] that he understood that an "important part" (*id.* at 31) of the determination of his sentence would depend on whether the government filed a motion requesting a lower sentence, and that the government's decision whether to file the motion was a "very important factor" to him. *Id.* at 32. These facts gave the jury an ample basis for assessing Delchamps' motives for testifying, his credibility, and the possibility that he was biased in favor of the government.[5]

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appraisal of [the witness's] credibility") (internal quotation marks omitted), cert. denied, 113 S. Ct. 416 (1992); *United States* v. *Klauer*, 856 F.2d 1147, 1149 (8th Cir. 1988) (no confrontation violation in denial of cross-examination about specifics of sentencing concessions witness received when the defendant had "more than ample opportunity to cross-examine [the witness] as to his bias, motive and overall unreliability as a witness").

[4] Although petitioner complains (Pet. 12-13) that the jury "never learned" that money laundering carries a maximum 20-year sentence, he never sought to elicit that information from Delchamps.

[5] Contrary to petitioner's assertion (Pet. 42), the court of appeals did not "engage[] in a kind of outcome-determinative analysis" that this Court rejected in *Van Arsdall*. Rather than requiring the defendant to show that "the particular limitation

2. Petitioner contends (Pet. 17-36) that the court of appeals' decision in this case conflicts with other decisions in which courts have found that restrictions on a defendant's cross-examination of a witness violated the Confrontation Clause. The cases on which petitioner relies, however, merely applied the legal standard set forth in *Davis* v. *Alaska* and *Delaware* v. *Van Arsdall* to the facts in those cases, as the court of appeals did here. See Pet. App. 7-8 (citing *Davis* and *Van Arsdall*). The different determinations made on different factual records in the cases petitioner cites does not present a conflict warranting this Court's review.

In any event, the cases on which petitioner relies do not support his claim. In *United States* v. *Lankford*, 955 F.2d 1545 (11th Cir. 1992), the court held that the district court violated the defendant's Confrontation Clause rights by preventing him from questioning the government's chief witness regarding state authorities' arrest of the witness's sons for selling marijuana. *Id.* at 1548-1549. The court explained that the witness's decision to cooperate with the government might have been motivated by a desire to prevent a federal investigation into his sons' marijuana trafficking or to solicit help from federal authorities

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on cross-examination created a reasonable possibility that the jury returned an inaccurate guilty verdict," 475 U.S. at 679-680, the court of appeals properly focused on "the particular witness, not on the outcome of the entire trial." *Id.* at 680. The court summarized the facts relating to Delchamps' bias that were placed before the jury during his direct examination and cross-examination and held that "[b]ased upon these facts, the jury could have inferred that Delchamps was a biased witness." Pet. App. 8-9.

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in his sons' state case. *Id.* at 1549. Moreover, the court noted, the witness's "cooperation with the government appears to have begun about the time when [the witness] was admittedly worried about his sons and the charges they were facing." *Id.* at 1549 n.8. In this case, however, the evidence of a connection between the potential criminal liability of the witness's relatives and his decision to cooperate with the government was much weaker than in *Lankford.* Delchamps' daughter and son-in-law had not been arrested, and there was no showing that they could have been charged with any offense. As the defense attorney acknowledged, the daughter and son-in-law were not even "named as targets or subjects" (Pet. App. 38) of the investigation. The suggestion that the government might have agreed not to charge Delchamps' daughter and son-in-law in exchange for his cooperation was wholly speculative.

United States v. *Roan Eagle*, 867 F.2d 436 (8th Cir.), cert. denied, 490 U.S. 1028 (1989), is also unhelpful to petitioner. In that case, the court found a confrontation violation where the district court disallowed cross-examination of a government witness concerning the details of her plea agreement with the government, including the offense to which she pleaded guilty and the maximum sentence she could receive. *Id.* at 442-443. Here, in contrast, the government introduced into evidence Delchamps' plea agreement, which stated the offenses to which Delchamps was entering guilty pleas and the maximum punishment he could receive for each offense, and petitioner's counsel cross-examined Delchamps about the terms of the agreement. Similarly, in *United States* v. *Mayans*, 17 F.3d 1174 (9th Cir. 1994),

the court of appeals held that the district court erred in refusing to allow cross-examination of government witnesses concerning their understanding of specific provisions of their plea agreements. *Id.* at 1184-1185. In this case, however, Delchamps testified on both direct examination and cross-examination concerning his understanding of the plea agreement.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1994

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[6] *United States* v. *Lynn*, 856 F.2d 430 (1st Cir. 1988), on which petitioner also relies (Pet. 34 n.18), is completely inapposite. In that case, the court held that the defendant's rights under the Confrontation Clause were violated when the district court allowed a government witness to testify that his plea agreement required him to "pass a polygraph test," but refused to permit the defense counsel to make any inquiry into the results of the polygraph examination, including the fact that some of the witness's answers were deemed "inconclusive" by the examiner. 856 F.2d at 432-434. No such evidence was present in this case.